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No. 82-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES TERRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the harmless error doctrine is applicable to error based upon a prosecutor's single, indirect and unobjected to reference to defendant's failure to testify where there is no reasonable possibility that it contributed to the conviction.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Appellate Court of Illinois, Fourth District, affirmed petitioner's conviction for murder in an unpublished order, No. 17696, dated August 26, 1982. That order is set out in the petition for a writ of certiorari, Appendix, Exhibit A. A petition for leave to appeal to the Illinois Supreme Court was denied on November 30, 1982.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). As treated more fully below, however, the respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF FACTS

Petitioner's summary of the evidence presented is adequate to apprise this Court of the extent of that evidence, however, petitioner incorrectly implies that all the witnesses offered to show that he was not present before, during or after the time of the shooting were consistent and uncontradicted.

The persons who were in the van that afternoon unanimously opposed that view. (R. 121-125, 153-155, 195-199) Carter and Williams stated that petitioner was with King in the park when they left. (R. 125, 156)

Johnny Wilson testified that he walked by the bench in the park between 3:00 and 3:30 p.m. with the victim, but he did not see petitioner. He stated positively that one of the men at the table was not petitioner, and that the second man looked bigger than petitioner. (R. 71-77) Wilson admitted that he did not see the second man's face (R. Vol. II, 79), however, and he apparently saw only two of the three men who would have been at the bench (See R. 121-124, 154).

E.V. Davis testified that he walked through the park between 3:30 and 4:00 p.m. when he saw Ricky King, the victim, and the other person he did not know on the bench by the tree. (R. 524, 526-527) Lola Wilson, Johnny Wilson's wife, testified that she walked outside her house near the park at 3:05 p.m. She stated that she did not see petitioner in or around the park, however, she also testified that the victim was sitting alone at the bench in the park at that time. (R. 512, 515, 518) Also, E.V. Davis and Lola Wilson each admitted having known petitioner for more than 15 years. (R. 512; Vol. V, 527)

Marquita Sykes and Curtis Jones both testified that they witnessed the shooting from points outside the park. In contradiction of all the other evidence in the case, Sykes and Curtis both reported that a woman shot the victim. (R. 477, 497) It was stipulated that Sykes and Curtis observed the shooting from distances of 260 feet and 300 feet, respectively. (R. C147-C148) Further, eleven-year-old Marquita Sykes testified that she had known petitioner for more than a year (R. 481, 486), and Curtis Jones stated that petitioner was a long-time friend. (R. 503)

REASON FOR DENYING THE WRIT

I.

THE HARMLESS ERROR DOCTRINE IS APPLICABLE TO ERROR BASED UPON A PROSECUTOR'S SINGLE, INDIRECT AND UNOBJECTED TO REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY WHERE THERE IS NO REASONABLE POSSIBILITY THAT IT CONTRIBUTED TO THE CONVICTION.

Petitioner asserts that the harmless error doctrine should not be applied where the error is based upon a prosecutor's reference to a defendant's failure to testify. In *Chapman v. California*, 386 U.S. 18 (1967), this Court declined to accept the rule that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Rather, this Court adopted the analysis of *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), where it was stated that "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In the instant case the Illinois trial and appellate courts found the prosecutor's single comment to be harmless. The prosecution theory was that defendant shot and killed one Edward Swims in a public park in Champaign, Illinois. The prosecution submitted evidence tending to establish that the petitioner, the victim and three other men arrived together at the park in a black van. In concluding his rebuttal argument the prosecutor said:

> You have heard about the events of that afternoon, five people in the van and three of them came in here and told you what happened and one is dead, thank you Ladies and Gentlemen. R. 763.

The petitioner did not object to the statement. The jury was then given its instructions for deliberation which in-

cluded the instruction that the fact that the petitioner did not testify should not be considered by them in any way in arriving at their verdict. (R. 171) In ruling on petitioner's post-trial motion, the trial court stated, "It may well be that the defense counsel didn't object because if the defense counsel was like the court at that point, after three hours of argument, defense counsel may have missed the significance of that just like the court did." (R. 834)

The trial court then pointed out that the jury was properly instructed not to consider the fact that the defendant did not testify. The court went on to state that with respect to the impact upon the jury, it could "conclude from the difficult task with which they found themselves confronted, and the serious and diligent manner in which they approached it, that they evaluated the evidence in the case, they obeyed the instructions, and were not effected by the remarks of counsel." (R. 835) The trial court observed again that the remark was "practically unnoticeable" and determined, therefore, that in light of the circumstances and the evidence presented at trial the error was harmless beyond a reasonable doubt. (R. 839)

The appellate court also found the error to be harmless under the circumstances commenting that if the remark "made no impression on the learned trial judge, it is difficult to see how a jury of laymen could be carried away by it" and observing that the subsequent instruction had "a large ameliorating influence." (Pet. Appendix at 4) Although there were contradictions and inconsistencies in the testimony of both prosecution and defense witnesses, the implication of the challenged remark was vague and could not reasonably have affected the jurors' resolution of the credibility questions.

Petitioner contends, nonetheless, that the improper remark was not harmless beyond a reasonable doubt due to the closely contested nature of the case. While the issue of credibility of the witnesses was paramount, it is well established that credibility is a question for the jury, and their verdict will be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Petitioner raised and lost the issue of reasonable doubt on appeal in the Illinois Appellate Court. Further, both the trial and appellate courts found little, if any, likelihood that the single, unobjected to remark could have affected the jurors' deliberations, if indeed they were cognizant of the remark and its vague implication.

This is not a case involving extensive comment on a defendant's failure to testify or where an inference of guilt from silence was stressed to the jury as a basis of conviction. *Anderson v. Nelson*, 390 U.S. 523 (1968); *Griffin v. California*, 380 U.S. 609 (1965). Nor is this a case involving substantial errors at trial which affected the overall fairness of petitioner's trial. *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979). Both the trial and appellate courts below were aware of the contested nature of the evidence and both found the improper remark to be harmless. Under the particular facts and circumstances of the instant case, the error was harmless beyond a reasonable doubt and, accordingly, the petition should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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April 1, 1983